

**IN THE SUPREME COURT OF OHIO**

GENE'S REFRIGERATION, HEATING &  
AIR CONDITIONING, INC.

Appellant,

v.

SHEET METAL WORKERS'  
INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 33,

Appellee.

Case No. 2008-0780

On Appeal from the Medina County Court  
of Appeals, Ninth Appellate District  
Case No. 06CA0104-M

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**REPLY BRIEF OF APPELLANT  
GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.**

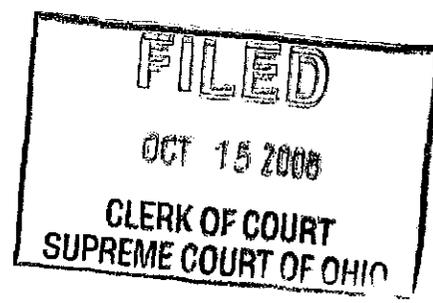
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## I. INTRODUCTION

Not surprisingly, the construction industry unions (“Amicus”), particularly the Appellee (“Local 33”), have seized on this opportunity to improperly argue for an extension of their construction industry collective bargaining agreements into the manufacturing and industrial industries traditionally represented by other labor unions. The increased labor costs associated with mandating that employees in manufacturing industries be paid construction industry prevailing wages will simply fall onto the taxpayers of the State of Ohio further stagnating and damaging Ohio’s already struggling economy. These construction industry unions see this case as a means to attain new work for their members by extending the applicability of Ohio’s Prevailing Wage Law to offsite work traditionally performed by other employees engaged in the industrial and manufacturing setting. These Amicus and Local 33 completely ignore the jobsite limitations placed upon the reach of their construction industry collective bargaining agreements by the National Labor Relations Board and argue without any support that their lopsided interpretation of R.C. 4115.05 is correct.

Yet, there is clear dissent in the unionized ranks and a clear disagreement as to the proper interpretation of R.C. 4115.05 as is evidenced by the dozens of union contractor associations who have filed briefs alongside non-union contractor associations and the tens of thousands of other Ohio’s businesses who implore this Court to recognize and hold that Ohio’s Prevailing Wage Law in 73 years has never been interpreted by any Court or administrative agency to apply to work performed offsite. This unanimous approach is supported by the

language of the statute when read as a whole, and through analysis of the interpretive provisions of the Administrative Code.<sup>1</sup>

Except for arguing that the 1934 holding of *Clymer v Zane* must have been *legislatively superseded* by an amendment in 1935 due to its “proximity in time,” the Amicus Unions and Local 33 offer this Court no other evidence, case law, administrative provisions, or any other authority to support the notion that R.C. 4115.05 applies to offsite manufacturing and related work. Surely, in 73 years there would be one example, one case or some administrative agency edict conjured up by the Amicus and Local 33 to support their position. The same parties fail to rebut Gene’s analysis of the statutory language contained in other portions of the statute and Administrative Code (“Code”) that limit compliance with prevailing wage laws to the jobsite of the public improvement, nor do the same rebut or distinguish the case law cited to by Gene’s and other Amicus which state that Ohio’s Prevailing Wage Law applies to the jobsite of the public improvement project. Local 33 and its Amicus also fail explain why in 1990, the newly drafted

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<sup>1</sup> Amicus briefs have been filed in this case by tens of thousands of union and non-union Ohio businesses stating that prevailing wage laws have never applied, and should not be applied to offsite work. Amicus briefs filed by union contractor associations include: the Associated General Contractors of Ohio, Ohio Contractors Association, the Ohio Ready Mixed Concrete Association, the Construction Employer’s Association, AGC of Ohio, Akron, AGC of Ohio, Cleveland, Carpenters Contractors Association, Concrete Contractors Association, Deep Foundations Contractors Association, Glazing Contractors Association, Greater Cleveland Roofing Contractors Association, Interior Systems Contractors Association, Mason Contractors Association, Millright Employers Association, North Central Ohio Council of Employers of Bricklayers, Steel & Iron Contractors Association, and the Tile-Marble-Terrazzo Contractors. Amicus briefs filed by union and non-union business associations include: the Northeastern Chapter of Associated Builders and Contractors, ABC of Ohio, the Ohio Chamber of Commerce, the Dayton Area Chamber of Commerce, the Council of Smaller Enterprises, the Greater Akron Chamber of Commerce, the Youngstown/Warren Regional Chamber, the Toledo Regional Chamber of Commerce, and the Cincinnati USA Regional Chamber of Commerce.

Surely, these Briefs are clear evidence of industry practice and custom in Ohio that Ohio’s Prevailing Wage Law has never applied to offsite work performed in connection with the public project.

and enacted Code, interpreting each provision of the prevailing wage statute, failed to include any provisions interpreting or mandating that R.C. 4115.05 applies to offsite work. The eight subsequent revisions by the Legislature since 1935, and the provisions of the Code adopted in 1990 make it absolutely clear that Ohio's Prevailing Wage Law was meant by the Legislature to only apply to "construction" work performed at the jobsite. If it was truly the Legislature's intent to overrule the holding in *Clymer v. Zane* by adding one sentence to present day R.C. 4115.05, requiring that prevailing wages be paid for offsite work, then the eight subsequent times that R.C. 4115.05 has been amended since 1935 has provided the Legislature and the administrative agencies with ample opportunities to clarify this intent and both have declined to do so.<sup>2</sup>

More so, Local 33 and its Amicus want this Court to read the one sentence contained in R.C. 4115.05 in isolation from the rest of the statute and Code, which they submit extends Ohio's Prevailing Wage Law to offsite work, and then want this Court to judicially legislate restrictions and exceptions into the sentence to limit the statute's applicability making the statute workable and enforceable. This position flies in the face of statutory interpretation. Simply put, only when read in isolation is there any potential ambiguity which results in an "all or nothing approach" by requiring that all "materials used in or in connection with" a public works project be paid at construction industry prevailing wages. The resulting ambiguity in this one sentence imposes prevailing wages offsite with no restrictions. It does not hint that its applicability excludes "prefabricated materials," resulting in the Ninth District's self composed legislative shellacking of an "intimate connection" requirement with the material fabricated, manufactured, delivered or supplied to a project.

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<sup>2</sup> GC § 17-4a; 116 v 206; 118 v 587; Bureau of Code Revision, 10-1-53; 128 v 935 (Eff 11-9-59); 131 v 992 (Eff 11-3-65); 135 v H 1171 (Eff 9-26-74); 137 v H 1129 (Eff 9-25-78); 141 v H 238 (Eff 7-1-85); 146 v S 162 (Eff 10-29-95); 148 v H 471. Eff 7-1-2000.

In essence, Local 33 cannot have its cake and eat it too. Only when the sentence is read in isolation is it ambiguous, resulting in the application of prevailing wages to every “material” used on the project. This renders the statute completely unworkable, unenforceable and absurd. If the statute is read as a whole, Local 33’s argument completely fails because the statute and the Code mandate that prevailing wage laws apply “to” the jobsite of the public project. Hence, the only rational approach to determine the meaning of this sentence and the Legislature’s true intent is to look at the rest of the statute as a whole, the provisions contained in the Code, Ohio case law and 74 years of industry practice and enforcement and conclude that Ohio’s Prevailing Wage Law has always been interpreted to apply to construction work performed at the jobsite of the public improvement.<sup>3</sup>

Local 33 and its Amicus fair no better with Gene’s Second Proposition of Law. Here Local 33 and its Amicus readily admit that it is their position that the true purpose of interested party standing is not to ensure employees working on public improvement projects are properly paid prevailing wages, but instead the true purpose of the law is to serve the union’s institutional interests in acquiring and preserving work for its members. Local 33 and its Amicus then ask the Court to expand the scope of interested party standing, and the “attorney-in-fact” relationship created thereby, so that any union can sue any contractor or represent the interests of any employee who performed any work in any trade or craft on any project regardless of whether this improperly forced relationship creates a clear conflict of interest, and regardless of whether an individual employee selects union representation.

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<sup>3</sup> See *Vaughn Industries, LLC v. DiMech Servs., et al.*, 167 Ohio App.3d 634, 643, 2006-Ohio-3381, 856 N.E.2d 312 and *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries*, 6<sup>th</sup> Dist. App. No. WD-07-026, 2008-Ohio-2992, ¶41.

If it was the Legislature's intent to allow a labor union to represent any employee on any public project simply because they are a "labor union," R.C. 4115.03(F) would have been drafted to reflect this, and their standing would not be purposefully restricted to acquiring "authorizations from employees," nor would their standing be limited to representing members of a contractor who "submitted a bid" on the public project. See R.C. 4115.03 (F). To protect the interests of all employees working on public improvement projects in State of Ohio, the Legislature acted to purposefully limit a labor unions standing to file a complaint when: (1) directly authorized by an individual employee who performed work on the project, and then only with regard to that particular employee; and/or (2) the union represents the interests of its own members who work for a contractor who submitted a bid on a contract for the Project and then, only against the contractor who competed on the project for the same contract. The latter interested party standing must be limited to the same trade or contract to preserve the intent of the Legislature and to prevent frivolous or harassing lawsuits filed by uninterested labor unions.

In short, Gene's submits that Ohio's Prevailing Wage Law should be interpreted to apply to construction work performed at the jobsite. Further, interested party standing by a labor union should be limited only to representing the interests of employees who specifically authorized the representation, and/or only to labor unions representing its members who work for a contractor who submitted a bid on the project. Gene's respectfully requests that its Propositions of Law Nos. 1 and 2 be adopted by the Court.

## **II. ARGUMENT**

Local 33 begins its brief emphasizing that its complaint against Gene's also includes allegations of workforce wide underpayments, misclassifications, ratio violations and reporting violations under Ohio's Prevailing Wage Law. However, these claims are entirely unfounded, as

no other Gene's employee attempted to file a prevailing wage complaint with the Department of Commerce and no other Gene's employee authorized Local 33 to represent them in this lawsuit. It is undisputed that Mr. Cherfan, who worked exclusively in Gene's fabrication shop, was the only employee who authorized Local 33 to represent him in this action.

**A. Proposition of Law No. 1.**

Local 33 contends that the amendment to R.C. 4115.05 in 1935 was directed at overruling the holding in *Clymer v. Zane*. However, Local 33 offers this Court nothing to prove the Legislature's intent to overrule *Clymer* and no explanation as to why in 73 years no court or administrative agency has ever required prevailing wages to be paid for offsite work or why the other portions of the statute and Code adopted after 1935 continue to exclusively refer to work performed "at," "upon" or "on" the jobsite of the public improvement. In the absence of presenting any examples of any offsite application of the law for 73 years, Gene's submits that this Court should reverse the Ninth District's decision.

**1. *Clymer v. Zane*.**

The holding of *Clymer v. Zane* has been followed and applied in this State and in others until the Ninth District concluded on March 10, 2008 that it must have been *legislatively overruled*. As this Court is well aware, and as exemplified by the *Scott Pontzer* uninsured/underinsured litigation, the Legislature acts swiftly and with a stated purpose to change certain statutory provisions intended to *legislatively supersede* Supreme Court decisions. As in the *Scott Pontzer* litigation, the statute enacted or amended will specifically cite to such decision to make the intent to supersede the holding absolutely clear.<sup>4</sup> There is no such

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<sup>4</sup> See R.C. 3937.18 (whereas the Legislature placed directly into the statute its clear intent to supersede Ohio Supreme Court decisions).

indication in General Code Section 17(a) of the Legislature's intent to *overrule* the holding of *Chymer*. Local 33's assertion of such a proposition is purely speculative.

## 2. Statutory Interpretation of R.C. 4115.05.

Significantly, Local 33 also fails to address Gene's position that Ohio's Prevailing Wage Law, when read as a whole, specifically refers and only applies to work performed "on," "upon" or "at" the site of the public improvement project.<sup>5</sup> Local 33 also fails to explain why the interpretive Code enacted in 1990 fails to address or include any provisions regarding offsite manufacturing or fabrication work.

No party refutes that before the Code was enacted in 1990, extensive hearings were held and testimony was taken from members of organized labor, construction industry employer groups and other stakeholders regarding the meaning, extent and interpretation of R.C. 4115.03 to 4115.16. During this time, and as evidenced by the explicit language contained in the Code, no interested party or the Department of Commerce itself, envisioned Ohio's Prevailing Wage Law through R.C. 4115.05 extending to offsite work. It is irrefutable that the Code sections do not discuss work performed offsite, and contrary to Local 33's assertions and Ninth District's decision,

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<sup>5</sup> See R.C. 4115.10(A) which states, "[a]ny employee upon any public improvement who is paid less than the...[prevailing wage] may recover...; R.C. 4115.10(B) continues, "Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the director...;" R.C. 4115.032 that states "Construction on any project, facility, or project facility to which section 122.452 [122.45.2], 122.80, 165.031 [165.03.1], 166.02, 1551.13, 1728.07, or 3706.042 [3706.04.2] of the Revised Code applies is hereby deemed to be construction of a public improvement within section 4115.03... All contractors and subcontractors working on such projects, facilities, or project facilities shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code..."; and R.C. 4115.05, which the Ninth District relied upon in rendering its incorrect decision begins with, "[e]very contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section." (Emphasis added).

specifically contains language that mandates Ohio's Prevailing Wage Law only applies to "construction" work performed at the jobsite of the public improvement.<sup>6</sup> The Code is the most recent comprehensive enactment concerning this law and the absence of language in the Code, make it absolutely clear that prevailing wages do not apply to any offsite manufacturing, fabrication, supply or delivery work.<sup>7</sup>

That is why Local 33 does not try to explain why the definition of "construction" contained in O.A.C. Ann. 4101:9-4-02(G) and R.C. 4115.03 (B) does not include any mention of offsite manufacturing, fabrication, delivery, or supply activities,<sup>8</sup> although the definition

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<sup>6</sup> See O.A.C. 4101:9-4-02(GG) which defines "'subcontractor' to mean any business association hired by a contractor to perform construction on a public improvement...; O.A.C. 4101:9-4-09(A), "Determination of wage rate schedule," which explicitly states "the director shall determine the prevailing rate of wages to be paid for a legal day's work to employees upon public works;" O.A.C. 4101:9-4-21(A), Maintenance, preservation, and inspection of payroll records, that provides "Each contractor and subcontractor performing work on a public improvement shall keep, maintain for inspection, and preserve accurate payroll records in accordance with these rules;" O.A.C. 4101:9-4-21(C), any records maintained by contractors and subcontractors concerning wages paid each employee or the number of hours worked by each employee on a public improvement shall be made available for inspection...; and O.A.C. 4101:9-4-23, "Investigation" states, a complaint may be filed with commerce by any employee upon a public improvement or any interested party. (Emphasis added).

<sup>7</sup> Pursuant to R.C. 1.49(F), when the language of a statute is ambiguous, one may consider the administrative construction of the statute in determining the intention of the General Assembly. As stated in *Wadsworth v. Dambach*, 99 Ohio App. 269, 280, 133 N.E.2d 158, "Administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative to do so." See *Rose Hill Chapel-Ciriello Funeral Home v. Ohio Bd. of Embalmers & Funeral Directors*, 105 Ohio App. 3d at 218, 663 N.E.2d at 981. An administrative agency's construction of a statute that the agency is empowered to enforce must be accorded due deference. See, e.g., *Leon v. Ohio Bd. Of Psychology* (1992), 63 Ohio St. 3d 683, 687, 590 N.E.2d 1223; *Chaney v. Clark Cty. Agricultural Soc., Inc.* (1993), 90 Ohio App. 3d 421, 426, 629 N.E.2d 513. In this case, the intent of the General Assembly is clearly established by the language of the 1990 regulations to exclude offsite work from prevailing wage coverage.

<sup>8</sup> O.A.C. Ann. 4101:9-4-02(G)(2) provides: Any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating of any public improvement the total overall project cost of which is fairly estimated to be more than fifteen thousand dollars ("threshold") adjusted biennially by the administrator and performed by other than full-time

specifically mentions jobsite activities such as demolition, installation, clean up, drilling, landscaping etc. . . . Local 33 also avoids addressing why the Code and the statute fail to define “materials,” or fails to mention or include definitions for “manufacturing” or other types of offsite work. Gene’s submits that if it were the intent of the Legislature to extend prevailing wage law to cover work performed offsite, these specific activities would have been defined. “Construction” of a “public improvement” are the quintessential elements of any project which triggers the application of the prevailing wage law. The fact that manufacturing, fabrication, delivery and supply are excluded from the definition of “construction,” coupled with the fact that various sections of the statute refer to “on” or “upon” a public improvement establishes that prevailing wages are to be paid only for “construction” work performed at the jobsite.

Local 33 and its Amicus also fail to address the Sixth District Court of Appeals decisions which hold that the “site of the work” for prevailing wage purposes is the jobsite of the public improvement.<sup>9</sup> Although some states (e.g., Washington) have prevailing wage statutes which apply prevailing wage rates to limited offsite work, Local 33 fails to disclose that these states also have comprehensive statutes defining precisely what type of offsite work is covered by each

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employees who have completed their probationary period in the classified service of a public authority. Construction includes, but is not limited to, dredging, shoring, demolition, drilling, blasting, excavating, clearing, clean up, landscaping, scaffolding, installation and any other change to the physical structure of a public improvement. (Emphasis added).

<sup>9</sup> See *Vaughn Industries, LLC v. DiMech Servs., et al.*, 167 Ohio App.3d 634, 643, 2006-Ohio-3381, 856 N.E.2d 312 (“The prevailing rate of wages for a specific jobsite is then set forth in a prevailing wage rate schedule which is posted at the jobsite. That schedule is to include the ratio of apprentices to skilled workers allowed on the jobsite. Ohio Adm. Code 4101:9-4-16(H).”) (Emphasis added); see *International Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Industries*, 6<sup>th</sup> Dist. App. No. WD-07-026, 2008-Ohio-2992, ¶41 (the Defendant properly posted the name of the prevailing wage coordinator on the “job box” located at the site of the construction project giving proper written notice of the coordinator’s identity to its employees pursuant to R.C. 4115.05).

specific craft or trade.<sup>10</sup> Such a comprehensive legislatively defined statute is exactly what is lacking here.<sup>11</sup>

### **3. The Ninth District Improperly Legislated from the Bench.**

Local 33 and its Amicus claim that R.C. 4115.05 as judicially limited by the Ninth District creates a workable and enforceable standard to apply Ohio's Prevailing Wage Law to offsite work. This is so because the Ninth District rewrote R.C. 4115.05 to apply to manufacturing and fabrication work performed offsite. Nowhere in R.C. 4115.05 or elsewhere in the statute or the Code is there mention of "offsite" manufacturing or delivery work. Certainly, such a monumental statutory undertaking would find some reference or support in other sections of the statute or Code. No such reference to offsite work is found.

Gene's interpretation of R.C. 4115.05, that applies the law to work performed at the jobsite of the public improvement, does not require this Court to judicially legislate exceptions for offsite work and is supported by other sections of the statute and the Administrative Code. Frequently, "materials" are manufactured, fabricated or assembled or moved on the jobsite of the public work. Hence, the purpose of R.C. 4115.05 is meant to cover this type of work performed at the jobsite. Local 33's claims that Gene's is expanding the reach of the Ninth District's decision to create absurd results is without merit, as the Ninth District judicially expanded the reach of prevailing wage law to offsite work based upon an ambiguous sentence read in isolation from the rest of the statute. Gene's interpretation of the statute is not superfluous as Local 33

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<sup>10</sup> See WAC Section 296-127-101 (vi) specifically states that prevailing wages apply to the fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (a)(i) through (v) of this subsection. Subsequent sections of the Code then apply Washington's prevailing wage law to specific work performed by specific construction crafts or trades. The statute is comprehensive.

<sup>11</sup> Contrary to Local 33's assertions regarding the divergence of Davis Bacon and Ohio law, Davis Bacon served as the model for Ohio's Prevailing Wage Law and is the closest analogous statute this Court can look at to interpret the ambiguous language contained in R.C. 4115.05.

contends, nor does it collapse sections of the statute into one. Gene's merely reads the statute and administrative regulations as a whole to determine the intent of the statute and its applicability to offsite work as required by the rules of statutory construction.

Local 33 and its Amicus state that the "horrors" contemplated by Gene's that the law would apply to all businesses who manufacture, fabricate, supply or deliver "materials used in or in connection with" a public improvement project are absurd and unfounded.<sup>12</sup> They suppose that a business can track its labor costs for manufacturing, delivering, supplying all "materials" that have a yet-to-be-defined Ninth District "intimate connection" with a public project. Yet with their expansive reading of prevailing wage law, somehow, Local 33 and the Ninth District agree and conclude that the law would not apply to any "prefabricated materials" which come from stock or inventory. This supposition is simply irrational as the expansion of prevailing wage law is not limited in any way by the language of the sentence being interpreted.

This is the precisely the problem with Local 33 and the Ninth District's interpretation of the R.C. 4115.05. To make the statute feasible, workable, and to avoid absurd results, this Court is called upon to "judicially" limit the effect of a language added in 1935, in other words, this Court is asked to legislate exceptions. Local 33 and its Amicus seek an interpretation of the R.C.

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<sup>12</sup> The "horrors" contemplated by Gene's are real. O.A.C. 4101:9-4-02 section (H) defines "Contractor" to mean any business association that is involved in construction of a public improvement. Contractor includes an owner, developer, recipients of publicly issued funds, and any person to the extent he participates in whole or in part in the construction of a public improvement by himself, through the use of employees, or by awarding subcontracts to subcontractors as defined in paragraph (GG) of this rule. Contractor also includes any business association that administers, conducts, and oversees construction of a public improvement by directing contractors and subcontractors on a specific project, but is not physically performing work on the project. Hence, if this Court determines that R.C. 4115.05 requires the payment of prevailing wages for offsite work done in or connection with a public improvement project it would clearly apply to any and all business entities supplying, delivering, manufacturing or fabricating materials for the project.

4115.05 that benefits their own interests, but requests that this Court legislate into the statute enough exceptions to keep the statute from being declared void, infirm and unworkable. The Court should decline the invitation from the Local 33 to save the ambiguous sentence contained in R.C. 4115.05 by engaging in judicial activism and legislating exceptions and conditions from the bench such as applying the statute only to contractors who perform construction work on the project. Either R.C. 4115.05 requires prevailing wages to be paid for all materials “used in or in connection with” a public improvement project when read in isolation from the rest of the statute, or it does not apply to offsite work when the statute is read as a whole. Simply stated, if an employer, whether a manufacturer, supplier, or contractor must pay construction industry prevailing wages to its employees for “all materials” that are assembled, mixed, manufactured, fabricated, delivered or otherwise constructed “in connection” with a public work, the extent of the law under the ambiguous wording of the statute would be endless. On the other hand, to legislate an “intimately connected” standard is equally unacceptable.

**B. Proposition of Law No. 2.**

Local 33 and its Amicus argue for expansion of interested party standing to allow them to file complaints against any contractor, regardless of their trade or craft, and for standing to represent every employee working on a public project if just one employee authorizes the union representation.<sup>13</sup> They irrationally argue that they “step into the shoes” of the Department of Commerce and have unlimited authority to represent all employees who worked on the project pursuant to R.C. 4115.16 and R.C. 4115.03 (F). They also claim that Gene’s interpretation of the

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<sup>13</sup> Local 33 states that its interested party standing was stipulated in the record allowing Local 33 to represent all employees who worked on the Project. This assertion is incorrect. The facts establish that Gene’s stipulated to the fact that Mr. Cherfan was the only employee to authorize Local 33’s representation. The scope of Local 33’s standing beyond the individual claims asserted by Mr. Cherfan has always been in dispute.

scope of interested party standing is absurd and will lead to some employees receiving relief while other unrepresented employees are denied relief. A review of R.C. 4115.16 reveals that Local 33 interpretation of the law is incorrect.

R.C. 4115.16 allows the interested party standing to file a administrative prevailing wage complaint with the Director and then with the trial court if the Director fails to rule on the merits of the administrative complaint within 60 days of its filing. However, R.C. 4115.03 (F) limits the union's interested party standing to representing employees who specifically authorize the action, and limits their standing to representing their members who work for a contractor who submitted a bid for a contract for the project. The fact that the statute mandates express authorization from employees who are not members of the union prevents the union from representing all employees on the Project. The fact that the statute mandates that the union's standing is contingent upon their members working for a contractor who submitted a bid on a specific contract for the project demonstrates that the standing is limited to file a complaint only against a contractor who submitted a bid on the same contract for the project, i.e. filing a complaint against a contractor engaged in the same craft or trade. See R.C. 4115.03 (F) (1)-(3).

Once interested party standing is achieved through one of these two processes, the Union may file a civil complaint either on behalf of its members or on behalf of the employees who specifically authorized the representation and who worked on the Project. Limiting the union's standing to these situations ensures that the "attorney-in-fact" fiduciary relationship created is not circumvented by the union preserving "its own interests" in the action as Local 33 admits is its driving force in filing complaints. This limitation on standing, which is clear from the statutory provisions, is the only protection employees have who work on the Project.

Local 33 incorrectly suggests that an employee who worked on the project may file their own administrative complaint under the statute after the union has filed its prevailing wage complaint into the trial court. This proposition is belied by the express language of the statute which commands: [T]he director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. See R.C. 4115.16 (B) (emphasis added).

Thus, R.C. 4115.16 completely stops the Department of Commerce's investigation into any aspect of the complaint filed by the Union regarding a contractor's prevailing wage compliance on a project. Hence, pursuant to the Union's argument, if a union has attained standing to represent all employees on the project, regardless of whether they authorized the representation, then, the Director is left powerless to investigate any other prevailing wage violation against the same contractor or with regard to the same employees forced into union representation after the union's civil complaint is filed. This interpretation is clearly not the Legislature's intent regarding interested party standing. If Local 33 prevails, employees who do not request union representation in a civil action would be forced into accepting the union as their "attorney-in-fact" are now at the mercy of the union to properly and competently represent their claims. Contrary to Local 33's claims, the proper focus of the interested party representation should be with regard to the "best interests of the affected employees," not the union.

Under Local 33's approach, if a union decides not to collect back pay for the employees affected, assuming a violation is found, and decides instead to settle the employees' claims for a payment of excessive attorneys' fees or in return for the employer signing a collective bargaining agreement, these employees have absolutely no recourse under the law against the union, nor can they file their own complaint with the Department as the claims originally represented by the Union would be deemed to be *res judicata*. Limiting the Union's standing to representing only

those employees who specifically authorize the representation would allow the Director to continue investigating complaints unrelated to the Union's complaint filed on behalf of the employees it was specifically authorized to represent, because the Union's complaint filed into the trial court would exclude the representation of those specific individuals. R.C. 4115.10 allows the Director to continue his investigation and/or would allow the affected employee to select his/her own representation. To allow an "interested party" to pursue and enforce claims on behalf of other employees who did not authorize the lawsuit violates this Court's holding in *Mohawk Mechanical*, the Legislature's intent, and the right of every employee to select his/her own "attorney-in-fact."

Local 33 and its Amicus openly admit that their own interests are paramount when they file prevailing wage complaints. For those employees who do not wish to select the Union as their attorney, it would be a travesty of justice to allow unions to expand the scope of interested party standing to represent employees who did not authorize or agree to such representation. Unlike the typical regulated class action lawsuit, employees are denied due process because the Local 33 approach permits no one to opt out, yet the unwilling employee is nevertheless made subservient to the union's interests in the litigation. Contrary to Local 33's assertions, the statute explicitly states in R.C. 4115.16 that the Court of Common Pleas, not the interested party, "steps into the shoes" of the director of the Department of Commerce.<sup>14</sup> It is important to note this fact because the investigative and representational authority afforded to the Court and the Department

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<sup>14</sup> R.C. 4115.16 (B) provides, "the court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director."

with regard to the enforcement of prevailing wage laws do not fall upon the Union to regulate, enforce or decide, but at all times remain with the Court or the Director.

Local 33 and its Amicus cite to this Court's decision in *Harris v. Van Hoose* (1990), 48 Ohio St.3d 24, 27 for the proposition that the Union, as an interested party, has the power to represent all employees on a Project regardless of whether they are so authorized. This assertion is clearly erroneous as the *Van Hoose* Court addressed the Director's statutory duty to investigate all claims and represent all employees on a project regardless of whether the Director obtained authorization from employees. This case is clearly distinguishable as it dealt exclusively with the authority of the "Director" under the statute and not the authority of an "interested party." As this Court found, R.C. 4115.10 mandates the Director to take action on behalf of employees who fail to do so regarding their prevailing wage claims. This same type of enforcement mandate is not imposed anywhere in the statute on interested parties. The interested party does not "step into the shoes" of the director, the trial court does, hence, the interested party has the same rights under the statute as are granted to the affected employee.<sup>15</sup> Because the rights of interested parties are the same as the rights of the employee, a clear fiduciary "attorney-in-fact" relationship is created between the union and employee. Local 33 cannot dispute that the Director acts at all times solely in the interest of the employees working on a public project. This is why the Director has been afforded by the Legislature greater representational rights with regard to employees who work on public projects.

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<sup>15</sup> See *IBEW, Local Union No. 8 v. Stollsteimer Elec., Inc.*, 168 Ohio App. 3d 238, 243-244 (Ohio Ct. App., Fulton County 2006) where the Court held the prevailing wage statute when read *in pari materia* to determine the meaning of R.C. 4115.13 (C), affords certain powers to the director of the Department of Commerce when director is named in the statute and affords separate powers to the trial court when the trial court is mentioned in the statute. None of the enumerated prescriptions of the prevailing wage statute which mention the trial court or the director are accorded to the interested party.

The same argument holds true for limiting the union's interested party standing to the same craft or trade. In other words, limiting a union's standing to representing its own members who work for a contractor that submitted a bid for the same contract as the contractor that is alleged to have violated the prevailing wage law. We agree with Local 33's assertion that employees who specifically authorized union representation are entitled to representation by a labor union that possesses "some expertise" regarding the "stuff of the prevailing wage statute." Of course, this is true because the "ratios" which apply to the jobsite, the "scope" of construction work each labor union claims for its members, and the wage rates themselves are taken directly from the collective bargaining agreements negotiated by each individual construction labor union. Local 33 does not refute Gene's assertions that they exclusively represent "sheet metal workers," nor do they claim to have any "expertise" regarding the terms of the collective bargaining agreements negotiated by another construction industry trade unions.

Why would the Legislature draft a prevailing wage law which would allow a union representing members performing plumbing work to file a lawsuit against a contractor performing carpentry or sheet metal work? Where is the "expertise" or the "interest" of the labor union in representing "its" membership? What union or non-union employee interests are protected in a situation when an "uninterested" labor union possesses little or no expertise regarding the construction work being performed or the wages being paid by different labor union? Gene's submits the Legislature recognized this problem and drafted R.C. 4115.03 (F) to limit the union's standing to representing its members who perform the same type of trade work and are employed by a contractor who submitted a bid on a specific contract on the project.

A balance between protecting employees' rights who work on public projects and the union's right to file a complaint as an interested party to protect its own members' interests must

be reached. The union and non-union employees alike must be afforded the protections contemplated by the Legislature to file and control their own complaints, direct their own settlements, select their own attorneys, or to elect to have the Department pursue their claims. The unregulated class action approach argued by Local 33 and its Amicus creates a slippery slope that eviscerates the purposeful limiting language included in R.C. 4115.03 (F). The position of Local 33 effectively strips every employee of their right to choose their own representatives and provides the union with the unregulated ability to pursue lawsuits that are in a Union's own self interests without fear of recourse.

Gene's submits that if the Union's interpretation of R.C. 4115.03 (F) was correct, the Legislature would have simply drafted R.C. 4115.03 (F) to simply state "any labor union may file a prevailing wage complaint as an interested party against any contractor or on behalf of any employee on any public project." The addition of the restrictions added to R.C. 4115.03(F)(3) completely belie this interpretation. The Ninth District's decision and the Sixth District's decision in *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1581 v. Edgerton Hardware Co., Inc.* 2007-Ohio-3958, 2007 Ohio App. LEXIS 3602 expand R.C. 4115.03 (F) to allow any labor organization of any trade jurisdiction interested party standing to file a complaint (or lawsuit) against any contractor who worked on the project, regardless of that contractor's trade/craft jurisdiction is simply an incorrect interpretation of the scope of interested party standing. It is submitted that a single labor union could never fairly and adequately represent such a broad and diverse class of individuals without impugning the ethical obligations inherent in every attorney/client relationship.

More so, these recent decisions conflict with the Third District's decision in *International Asso. of Bridge, etc. Local Union 290 v. Ohio Bridge Corp.* (1987), 32 Ohio App. 3d 18, 20, 513

N.E.2d 358, where the Court not only held that in the absence of a unsuccessful union bidder, the employees must specifically authorize the union's representation, but, also held that interested party standing applied only where contractors had competed for the same contract for the project. In other words, the contractor and/or a labor organization could file a prevailing wage complaint against only those contractors who were engaged in the same trade or craft submitting bids for the same contract on the project.

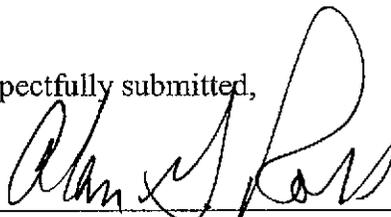
The Ninth District's decision regarding the union's interested party standing is unduly expansive, contrary to the Legislature's intent and is clearly erroneous in light of this Court's holding in *Mohawk*. As such, "interested party" standing by labor organizations should be limited to representing only those employees who specifically authorize the representation. Gene's Proposition of Law No. 2 should be adopted by the Court, resulting in Mr. Cherfan being the only employee the *Mohawk Mechanical* Court and R.C. 4115.03(F) would permit Local 33 to represent. Since, Mr. Cherfan did not perform any "construction activities," nor did he perform any other work at the jobsite of the project at issue, then the Court's adoption of Gene's Proposition of Law No. 1 and No. 2 would result in the dismissal of Local 33's Complaint in this case.

### **III. CONCLUSION**

The decision of the Ninth District Court of Appeals is fundamentally wrong and has turned 73 years of prevailing wage law interpretation and application on its head. The Ninth District's decision has introduced confusion and absurdity into what are otherwise well established principles of law that are reflective of union and non-union industry practices. A reversal of the Ninth District's decision will not create new law, but will return the law to the

status quo. As such, the Ninth District opinion should be reversed in total and Gene's two Propositions of Law adopted.

Respectfully submitted,



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Dated: October 14, 2008

**CERTIFICATE OF SERVICE**

This is to certify that one copy of the foregoing Reply Brief of Appellant was served this 14<sup>th</sup> day of October 2008 via U.S. Mail, postage prepaid, upon the following:

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